Supreme Court, U.S.
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No. 91-794

In The

Supreme Court of the United States

October Term, 1992

HENRY HARPER, et al.,

Petitioners,

v.

VIRGINIA DEPARTMENT OF TAXATION,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Virginia

BRIEF OF THE STATE OF GEORGIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The State of Georgia, as one of 16 states still involved in litigation resulting from *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), has both an immediate and long-term interest in the rules governing retroactive/prospective application of U.S. Supreme Court decisions invalidating state tax statutes.

SUMMARY OF ARGUMENT

The amicus brief filed by James B. Beam Distilling Company ("Beam") mischaracterizes the State of Georgia's position on remand following this Court's ruling in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991) ("*Beam*"), concerns matters which this Court in *Beam* specifically reserved for resolution by the lower courts, and is irrelevant to the instant case. Beam's contentions should not be allowed to confuse the important issues presented here. Rather, the Court should recognize *Chevron Oil v. Huson*, 404 U.S. 97 (1971) as setting out the test by which retroactivity will be determined in this case, and affirm the Virginia Supreme Court.

ARGUMENT

The instant case presents this Court with an opportunity to set forth unequivocally a retroactivity standard that recognizes the reasonable reliance interests and settled expectations of state governments and that takes into account the special nature of state taxes. Amicus agrees

with Respondent State of Virginia that the *Chevron Oil* analysis is a fair, reasonable, and workable test for this case. Instead of burdening the Court with yet another brief to this effect, the State of Georgia would have preferred simply to join with other amici states which have articulated in greater detail their support for the *Chevron Oil* test and the decision of the Virginia Supreme Court below. However, James B. Beam Distilling Company has filed an amicus brief in support of the petitioners to complain of alleged "conduct of the State of Georgia since the date this Court ruled in *Beam*," Brief of Amicus Beam, page 1. The State of Georgia cannot allow Beam's allegations to go unanswered, for they are unwarranted and baseless, are inappropriately asserted in this proceeding, and should not influence the Court's consideration of the important issues actually before the Court.

Regrettably, Beam's participation in this case appears to be an effort to improperly gain an advantage in Beam's litigation with the State of Georgia, now on remand to the trial court. Mischaracterizing the State's position on remand as "frivolous" and "procedural gamesmanship," Brief of Amicus Beam, page 5, Beam asserts that "the only remaining task of the court [below] is to enter judgment for Beam," Brief of Amicus Beam, page 10, and the company essentially urges the Court to say so here. Beam's assertion that this Court's earlier opinion deprives the State of Georgia of the opportunity to argue remedial issues on remand is groundless. In the *Beam* decision, the Court expressly declined

> [to] speculate about the remedy that may be appropriate . . . ; remedial issues were neither considered below nor argued to this Court, save for an effort by petitioner to buttress its claim by our decision last Term in *McKesson*. As we have observed repeatedly, federal "issues of remedy . . . may well be intertwined with, or their consideration obviated by, issues of state law." *Bacchus*, 468 U.S. at 277. Nothing we say here deprives respondent of his opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided, a matter with which *McKesson* did not deal.

111 S. Ct. at 2448. After remand of the case to the Georgia Supreme Court, the case was remanded to the trial court. Beam immediately initiated discovery to develop a record concerning the remedial issues left open by the Court's ruling, and, after discovery by both parties, each moved for summary judgment. These motions are now pending, and involve such issues as the applicability of various procedural bars under state law, construction of state remedial statutes, whether Beam (if entitled to any recovery) could recover more than 50% of its payments, and other purely remedial issues. While Beam may disagree with the State's position on some of the remedial issues, counsel for Beam acknowledged before the trial court that the State's contentions are being asserted in good faith. Further, the arguments and issues before the trial court constitute matters which the Court specifically reserved for resolution on remand, and which should be disposed of by the courts below before any party, including Beam, attempts to seek this Court's review again.

In the matter which is truly at hand, the State of Georgia fully supports Respondent State of Virginia.

Amicus agrees that the three-part test set out in *Chevron Oil v. Huson*, 404 U.S. 97 (1971) should be the test by which the Court determines retroactivity in the instant case, and that the Court's holding in *Davis*, when measured against the *Chevron Oil* standard, should be given prospective-only effect. Beam's effort to catapult back into this Court serves only to muddy the waters, and Beam's arguments are entitled to no serious consideration.

CONCLUSION

The decision of the Virginia Supreme Court should be affirmed.

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